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No. 89-1230

In The
Supreme Court of The United States
October Term, 1989

CITY OF CHICAGO and
SUPERINTENDENT OF POLICE
Petitioners,

v.

WALTER FRIEDRICH,
individually and on behalf of a class
of similarly situated persons,
Respondents.

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether fees and expenses for experts who advise and testify in civil rights litigation are reimbursable under The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

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STATEMENT OF THE CASE

Respondents are a class of hundreds of street performers in Chicago who brought a successful civil rights suit under 42 U.S.C. § 1983 to

enjoin a municipal ordinance that restricted respondents' First Amendment rights. The litigation was financially sponsored by the Roger Baldwin Foundation of the American Civil Liberties Union ("RBF") and the plaintiffs were represented by RBF and cooperating pro bono private counsel. RBF is the not-for-profit legal arm of the American Civil Liberties Union ("ACLU") in Illinois.

At the trial court level, respondents engaged two experts to advise and to testify in the case: Robert di Grazia, an experienced law enforcement official, and William H. Whyte, an internationally-recognized sociologist. As the prevailing party, respondents sought and obtained an award of attorney's fees under the

Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (the "Fee Act" or "Section 1988"), which included $9,927.91 for the fees and expenses paid to those experts. App. 19, 31.[1]

The bulk of the expert fees awarded to respondents was for out-of-court research and consultation rather than testimonial work. As the Court of Appeals noted, "less than ten percent of the money paid the experts was for time actually testifying." Friedrich v. City of Chicago, 888 F.2d 511, 515 (7th Cir. 1989) (App. 6). In fact, respondents sought no compensation for the trial testimony of Mr. Whyte, and

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[1]The district court found respondents' experts expenses to be reasonable (App. 30), and neither the reasonableness nor the necessity of the expenses incurred for experts was challenged by petitioners. Friedrich, 888 F.2d at 513 (App. 3).

the $2,026.66 awarded in connection with his services was only to reimburse the costs of Mr. Whyte's pretrial consulting and travel. He declined to charge a fee for attending and testifying at the court proceedings. (R. 120, Ex. B at ¶ 16).

In the proceedings below, experienced civil rights trial counsel established, by declaration, the inability of traditional civil rights plaintiffs to obtain expert services pro bono, and their inability in this and other cases personally to bear such expenses. (R. 120, Ex. B at ¶¶ 15-16). The evidence further showed, first, that private civil rights and civil liberties organizations like the RBF, which depend solely on private charitable contributions have only

limited ability to sponsor civil rights litigation and, second, that recovery of these expenses is critical to RBF's ability to maintain its legal program through future cases which advance the goals of the Fee Act. (R. 120, Ex. B. at ¶¶ 17-18). None of this evidence was challenged by petitioner in the trial court.

The Court of Appeals for the Seventh Circuit affirmed the district court's award of experts' fees, relying on Missouri v. Jenkins, ___ U.S. ___, 109 S.Ct. 2463 (1989), and concluding that it would be "both arbitrary and inconsistent" with the meaning of Section 1988 to hold that, of all expenses ordinarily shifted under fee-shifting statutes, only expert-witness

fees are excluded. Friedrich, 888 F.2d at 519 (App.14).

The Court of Appeals recognized that the issue of expert fees is broader than the narrow question of whether expert witness fees are "otherwise provided by law" within the meaning of 28 U.S.C. § 1821.[2] Cf. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). The court pointed out that, however this question is answered, "the plaintiffs in this case would still be entitled to an award of fees incurred for advice, as distinct from testimony." Friedrich, 888 F.2d at 515 (App. 7). The court

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[2]Section 1821 provides that, "[e]xcept as otherwise provided by law," a witness in attendance at a court of the United States "shall be paid an attendance fee of $30.00 per day." (emphasis added).

reasoned that the time spent by an expert "to educate counsel in a technical matter germane to the suit" is a "substitute for lawyer time, just as paralegal time is." Friedrich, 888 F.2d at 514 (App. 5). The court stated as follows:

> There is thus no basis for distinguishing Jenkins from the present case so far as time spent by these experts in educating plaintiffs' lawyer is concerned . . . , for it is difficult to separate time spent by an expert in educating the lawyer from time spent in preparing to testify. Sometimes it is impossible; the same time may serve both purposes.

Friedrich, 888 F.2d at 514-15 (App. 5).

REASONS FOR NOT OPPOSING THE WRIT AND FOR CONSOLIDATING ORAL ARGUMENT WITH THE CASEY CASE

Respondents' position is that this Court's decision in Missouri v.

Jenkins, ___ U.S. ___, 109 S. Ct. 2463 (1989), has resolved the issue of whether Section 1988 authorizes the reimbursement of fees and expenses for experts who advise and testify. The primary reason for the apparent split in the Circuits is that the cases disallowing reimbursement, other than West Virginia University Hosptials v. Casey, 885 F.2d 11 (3d Cir. 1989), petition for cert. granted, 58 U.S.L.W. 3545 (U.S. February 26, 1990) (hereinafter Casey), were decided prior to Jenkins.[3] However, in view of this

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[3] See, e.g., Gilbert v. City of Little Rock, 867 F.2d 1062 (8th Cir.) (en banc) (affirming by an equally divided vote a district court's denial of expert fees under Section 1988 in excess of $30 per day), cert. denied, 110 S. Ct. 57 (1989); Sevigny v. Dicksey, 846 F.2d 953 (4th Cir. 1988) (denying expert witness fees under Section 1988); and Boring v. Kozakiewicz, 833 F.2d 468 (3d Cir. 1987) (denying expert witness fees

Court's grant of certiorari in Casey, respondents do not oppose a grant of certiorari in City of Chicago v. Friedrich No. 89-1230,[4] and request that Friedrich and Casey be consolidated for purposes of oral argument before this Court, pursuant to Supreme Court Rule 27.3.

Respondents believe that joint consideration of Friedrich and Casey will contribute substantially to the Court's deliberations by providing the perspective of a traditional civil rights litigant and organization as well as a different factual context. Additionally, this Court will benefit

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under Section 1988), cert. denied, 108 S. Ct. 1298 (1988).

[4] 888 F.2d 511 (7th Cir. 1989), petition for cert. filed, 58 U.S.L.W. 3505 (U.S. January 29, 1990).

by hearing the two cases together because the Court of Appeals' opinion in Friedrich offers a more complete analysis of non-testimonial expert expenses and of this Court's decision in Jenkins.

FRIEDRICH PRESENTS THE IMPORTANT ISSUE OF THE RECOVERABILITY OF AN EXPERT'S FEES FOR NON-TESTIMONIAL TIME IN A TRADITIONAL CIVIL RIGHTS CASE.

The question presented in Casey (No. 89-994) is phrased in terms of "compensation for expert witnesses" (emphasis added). Petitioners in Friedrich have phrased the question as whether Section 1988 "authorizes an award of expert witness fees in excess of the $30 per day allowed by 28 U.S.C. §§ 1821, 1920(3)." See Petition for Certiorari at i, Friedrich (No. 89-

1230). The true question presented by these cases -- and the issue respondents request this Court to address -- is a broader one: whether the fees reimbursable under Section 1988 include fees and expenses for an expert's non-testimonial time spent consulting, advising, and assisting counsel, as well as fees and expenses for attendance as a witness at trial.

The decision of the Court of Appeals for the Third Circuit in Casey did not address the distinction between experts' fees and expenses incurred for testimony and experts' fees and expenses incurred for consultation with attorneys. As the Court of Appeals for the Seventh Circuit pointed out in Friedrich, however, the time spent by an expert advising and educating

counsel substitutes for attorney time and contributes to an attorney's work product. Friedrich, 888 F.2d at 514 (App. 5). The evidence in the proceedings below established that civil rights litigation often includes important questions relating to many disciplines which are beyond the knowledge of lay persons, attorneys and judges and that the services of experts are necessary to prepare properly to litigate such difficult issues. (R. 120, Ex. B. ¶ 14). To deny recovery of a consulting expert's fees and expenses "would encourage underspecialization and inefficient trial preparation." Friedrich, 888 F.2d at 514 (App. 5).

The court in Friedrich noted that "less than ten percent of the money paid the experts was for time actually

testifying" and concluded that respondents were entitled to "fees incurred for advice, as distinct from testimony and preparation for testimony, by experts" because "Sections 1821 and 1920 do not bear on fees for nontestimonial services." Friedrich, 888 F.2d at 515 (App. 7). In so ruling, the Court of Appeals answered the two questions posed in Denny v. Westfield State College, 880 F.2d 1465 (1st Cir. 1989), as to "whether, or under what conditions, expenditures for 'non-witness experts' such as consultants and private investigators may be shifted after Crawford" and whether and to what extent "the costs of non-testimonial time spent by an expert witness . . . may or may not be shifted." Denny, 880

F.2d at 1474. The Court of Appeals in Casey did not focus on these questions and therefore misunderstood the relevance of this Court's decision in Jenkins to awards of expert fees under Section 1988.

In concluding that Crawford Fitting was the controlling precedent on the issue of expert fees, the Casey court accepted the superficial argument that the words "expert witness fees" must literally appear in the Fee Act in order to meet the Crawford test. Casey, 885 F.2d at 34. In so doing, the Court of Appeals for the Third Circuit further failed to follow this Court's guidance in Jenkins and to examine the legislative history of the Act.

In Friedrich, however, the Seventh Circuit did examine the legislative background of Section 1988 and did so in the context of the sort of paradigmatic civil rights case considered by Congress when it adopted the Fee Act.

As recognized by the Court of Appeals in Friedrich, the legislative history and purposes of Section 1988 show that Congress desired prevailing parties to recover "what it costs them to vindicate these [civil] rights in court." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2 (1976), reprinted in, 1976 U.S. Code Cong. Admin. News at 5910. The legislative history also reveals Congress' recognition that a "vast majority" of the civil rights plaintiffs were unable to vindicate

their rights in the courts because of economic barriers. H. Rep. No. 94-1588, 94th Cong., 2d Sess. 1, 6 (1976). The plaintiffs in Friedrich, like most civil rights plaintiffs, are individuals of extremely limited means, and, unless their attorneys can be reimbursed for the expense of expert consultants and witnesses, their hopes of vindicating those rights dim.

Here, the Roger Baldwin Foundation of the American Civil Liberties Union, Inc. ("RBF") bore the expense of retaining the experts, Messrs. di Grazia and Whyte. The RBF does not accept government grants and funding and is dependent upon the private funding community. Because the RBF, like other civil rights organizations, sometimes supports

unpopular causes, private funding fluctuates. Recovery of expenses for experts fees, therefore, is vital to the RBF's "ability to maintain its legal program through future cases which further advance the goals of the Fee Act." (R. 120, Ex. B., at ¶¶ 17, 18)

One of the Fee Act's sponsors, Representative Drinan, made it clear during House floor debates that the fee-shifting provision of the statute was intended to compensate prevailing civil rights plaintiffs for costs incurred in bringing civil rights suits:

> I should add that the phrase "attorney's fee" would include the values of the legal services provided by counsel, <u>including all incidental and necessary expenses incurred in furnishing</u>

> effective and competent representation.

122 Cong. Rec. 35,123 (1976) (emphasis added). As this Court concluded in Jenkins, "a 'reasonable attorney's fee' cannot have been meant to compensate only work performed personally by members of the bar." Jenkins, 109 S. Ct. at 2470. Rather, the phrase "a reasonable attorney's fee":

> must refer to a reasonable fee for the work product of an attorney. Thus, the fee must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit.

Jenkins, 109 S. Ct. at 2470 (emphasis added).

Petitioners contend that the appellate court's interpretation of Section 1988 in Friedrich "departs radically from the reasoning of this Court and the decisions of other courts, particularly the Third Circuit." See Petition for a Writ of Certiorari at 13, Friedrich (No. 89-1230). Respondents disagree and contend that, far from being a "radical departure," the Seventh Circuit's decision in Friedrich is the only case cited to the court by petitioners that is consistent with Jenkins and Section 1988. The decision in Jenkins makes clear that Congress intended Section 1988 to remove the economic barriers to civil rights litigation by granting a prevailing civil rights plaintiff a

fully compensatory fee. Jenkins, 109 S. Ct. at 2470.

Because the facts and legal analysis in Friedrich present the broader question of the recovery of fees and expenses for both testifying and non-testifying experts in the context of a traditional civil rights case, its consideration by this Court along with Casey will best serve the interest of justice.

CONCLUSION

In light of this Court's grant of certiorari in Casey, Respondents do not oppose a grant of certiorari in this case and request that it be consolidated for purposes of oral argument pursuant to Rule 27.3 with

West Virginia University Hospitals v. Casey, No. 89-994.

Respectfully submitted,

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